***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

IN THE UNITED STATES

COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24 487

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RICHARD R. KUCIA,

Plaintiff, Appellant

v.

MONSANTO CHEMICAL CORP. (ALIAS MONSANTO CO.)

Defendant, Appellee

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APPEAL

BRIEF FOR APPELLANT

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FROM DISTRICT OF COLUMBIA FEDERAL DISRICT COURT

Case No. 748-67



Filed September, 1970 by
Richard R. Kucia, pro se
107 Kennedy Street
Alexandria, Va., 22305

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   A. Were there errors at the trial in interpreting the contract?

2. Was the lower court in error in excluding expert testimony of the witnesses?

   A. Errors in excluding miscellaneous testimony?

3. Was the lower court in error in excluding facts and evidence previously established in Workmen's Compensation procedure?

4. Were the facts and conclusions below in error and contrary to the weight of the evidence?

5. In view of the evidence in the file under oath, did the Court abuse its discretion in denying a motion for a new trial, especially under the circumstances of additional evidence being offered?

THIS IS THE FIRST APPEAL
TO THE COURT OF APPEALS IN THIS CAUSE

STATEMENT OF THE CASE

Mr. Richard Kucia was employed by Monsanto Corp. as a Research Chemical Engineer pursuant to a written contract signed by the employee and an authorized representative of the Corporation, Mr. Bible, dated September 19, 1960. The contract provided a monthly salary, said consideration being ascertainable at any given time using standrad acccunting methods; the salary was subject to change by MUTUAL agreement of the parties. Further the contract provided that even after termination, vested rights under the contract continued for a period of three years after the contract was terminated. Written and oral representations made to the employee included that he would receive sick pay when he became ill and that his employment status was relatively permanent and would continue.

From time to time the corporation would describe and illuminate the fringe benefits which were payable to their employees and in particular to Mr. Kucia.

At the corporation's request, the employee moved th Texas in September, 1963. In February of 1964 the employee entered into an earnest money contract which provided among its terms that the employee would try to obtain a loan which was to be used for the purchase of property, a home. Pursuant to the earnest money contract Mr. Kucia requested an authorized personnel representative of the corporation to verify his employment which was done, Exhibit number 101. The house

was built and relying on the corporation's representations the final papers were signed in June, 1964.

In September 1964 the employee was transferred within the Research Laboratories to a group handling a different type chemical. Shortly thereafter the employee reported to the plant nurse with respiratory ailments. The employee's work schedule was a regular work week plus overtime; in addition the corporation encouraged its employees into further training and pursuant thereto the employees also attended law school as a part-time student, throughout his employment with the corporation. The employee at all times tried to perform his job assignments. About December 31, 1964 the employee became exposed to chemicals at work which severely irritated his bronchi. HE RETURNED HOME FROM WORK ILL. The illness progressively worsened in spite of medical treatment and he was admitted by an experienced medical doctor into a hospital with a diagnosis of Bronchitis for intensive treatment near the end of January, 1965. Hospital treatment lasted 10 days followed by rest at home.

The employee returned to the Plant about the middle of February but could not perform his job duties; his supervisor requested his resignation in March of 1965. The employment was terminated with the employee unable to resign because the nature, duration and extent of the injury was uncertain. In his schoolwork the employee for the first time and only time

in 10 years of college during the Spring term flunked. Mr. Kucia actively sought other employment but it became quite evident that employment was not available whereupon the employee in an effort to obtain other occupational capabilities returned to school on a full time basis in September of 1965. Three months after graduating Mr. Kucia obtained employment at a much reduced salary at the U.S. Patent Office in 1966. Even today, post nasal discharge has prevented the employee from fully recovering from the illness, note page 3 of exhibit 7; nevertheless his job performance for the U.S. Government has been acceptable or even superior at times.

## BACKGROUND OF THE CASE

During the years in which these incidents occured technically competent individuals were in relatively short supply. In order to be able to compete in the market in employing technically trained individuals and to retain their services when employed, Monsanto represented to said employees, as a group and as individuals, that upon becoming ill for any reason they would receive an insurance type fringe benefit and continue to be paid salary for a limited time. It was understood that said benefits would be granted under normal circumstances; during these years the corporation was operating at very profitable levels. Since Workmen's Compensation was generally a small amount, the salaried employee when he became ill would lose 90 or more % of his salary even when he was eligible to recover Workmen's Compensation. The change from a relatively high wage scale to a low poverty class wage scale was severe; the fringe benefit sick pay was intended to ameliorate such losses.

In Texas, the corporation had several large chemical plants with a research development lab in the middle of its Texas City plant. The employees of said plant in addition to being exposed to the normal environmental conditions worked in close proximity to the chemicals being manufactured. In addition the employees within the lab actually physically handled the chemicals. Employees worked the regular work week, some limited overtime and were encouraged to pursue

further training. This plant is located on the Gulf Coast. When the weather moves out of the Southwest, it is the first in a series of plants to start polluting the atmosphere with noxious material, thereby handicapping industry to the East and other parts of the country from chemical production. The incremental pollution resulting from other plants into an atmosphere previously polluted in another part of the country by said corporation will raise pollution to dangerous levels under adverse atmospheric conditions.

Further gaining an advantage over its competitors by keeping its insurance rates low and by operating its plants in Texas with lenient pollution controls, Monsanto's Texas management pursued a policy of refusing to acknowledge the pollution problem, injuries to its employees and claims resulting therefrom using censorship, harassment, and blackballing; the corporation discouraged claims so that it could maintain an economic advantage against its competitors.

## PROCEEDINGS BELOW

About June of 1965 a claim for Workmen's Compensation was filed with the Texas State Industrial Accident Board. Employee's doctor submitted medical statements in the form of letters to the Board. The Industrial Accident Board about September of 1965 made a determination that the evidence submitted to them was insufficient to establish a claim. Pursuant to Texas procedure a suit was filed in a District Court of said State whereupon depositions under oath from the employee and his doctor were obtained. Further, at a trial both the employee and his doctor testified. During said proceedings the employer's privy, Insurance Company, vigorously defended the suit managing to confuse the jury whereupon the Judge granted another trial.

Mr. Kucia proposed to call his wife at the next trial as a witness in addition to the testimony previously presented whereupon a compromise settlement of $2,500 was reached. The Workmen's Compensation Act provides for a maximum compensation of $55 a week.

During pendency of the Workmen's Compensation actions the employee filed District of Columbia action 748-67 to recover compensation due him above that he could collect under Workmen's Compensation along with a claim for losses because of his purchase of a home on representations of the employer. Furthermore the employee requested payment of $290 worth of unpaid checks made out to him by Monsanto. Additional

allegations relating to invasion of privacy, harassment and interference with Mr. Kucia's rights after termination of employment by the employer were also asserted.

Affidavits along with answers to interrogatories under oath and a deposition were filed in the case. Prior to pre-trial the court entered an order excluding evidence from the Workmen's Compensation suit and continually refused to admit any facts already determined in the Workmen's Compensation procedure.

At the pre-trial hearing employee's attorney requested certain stipulations to be agreed to by the corporation but as stated by the pre-trial examiner, the corporation's attorney refused to agree to anything.

A trial occured at which the Judge gave the corporation a judgement dismissing the claim without the corporation presenting any testimony. A motion for a new trial was filed offering to produce additional evidence and correcting errors at the trial below which motion was not granted. At the motion for a new trial, the employee called the court's attention to information contained in the deposition obtained under oath and in the papers filed in the case.

The decision in the D.C. Court was, in effect, that the employee had not presented any evidence even though both he and his wife testified along with corroborating exhibits. An appeal was filed and a transcript of the proceedings obtained

which was filed along with various exhibits. After several extensions of time because of delays in obtaining the transcript, the appeal was docketed with the Court of Appeals.

## REFERENCES TO RULINGS

| | Dated |
|---|---|
| Interogatories | March, 1968 |
| Deposition | May, 1969 |
| Order Of Judge Corcoran | 1969 |
| Pre-Trial - Last Page | Nov. 18, 1969 |
| Findings of Fact and Conclusion of Law | March 30, 1970 |
| Transcript of Proceedings | March 3, 1970 |
| Motion For New Trial | March 23, 1970 |
| Dismissed | April 7, 1970 |
| Judgement For Defendant | April 9, 1970 |

DECISIONS BELOW

After a jury trial in Texas District Court, motion for new trial granted. Workmen's Compensation claim settled by compromise for $2,500 in a Texas Court.

D.C. 748-67

The Judge determined: (1) that the employee was entitled to recover under occupational illness only if illness was the reason for separation; (2) there has been no proof that this was an occupational illness or accident; (3) there is nothing from which an inference can be drawn that the separation was because of illness, either occupational or non-occupational; (4) as to the invasion of privacy there has been no testimony whatsoever; (5) there is nothing in the record that the house was purchased on any representation from anyone; (6) there is just no case here; (7) defendant's motion for judgement granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the plaintiff was employed by defendant as a Research Chemical Engineer pursuant to a written contract dated September 19, 1960.

2. That on March 31, 1965 the plaintiff's employment with the defendant was terminated.

3. That the plaintiff's employment with the defendant was terminated because his work was inadequate and below the standards demanded by the company.

4. That defendant Monsanto complied with all of the terms and conditions of its employment contract with the plaintiff.

5. That the plaintiff received all employment and fringe benefits to which he was entitled.

6. That there is no evidence that at the time of the plaintiff's termination he suffered from an occupational illness or accident, nor is there any evidence presented by the plaintiff from which the inference could be drawn that the plaintiff's separation from employment was because of accident or illness, either occupational or non-occupational.

7. That there is no evidence that the defendant or its agents invaded the plaintiff's privacy or that they harassed him or prevented him from obtaining employment.

8. That there is no evidence that the defendant prevented fellow employees from writing letters of endorsement or personal friends of the plaintiff from writing endorsements for the plaintiff.

9. That there is no evidence that the defendant retained detectives and investigators who persistently made inquiries about the plaintiff subsequent to his discharge.

10. That there is no evidence that the defendant attempted to prevent the plaintiff from obtaining employment anywhere.

11. That the plaintiff purchased a house in Texas shortly after being transferred to the Texas City plant.

12. That there is no evidence that the defendant represented to the plaintiff that his employment would be steady or that he should purchase a house near the plant.

13. That there is no evidence that the plaintiff's house

was purchased on any representation from any agent or employee of the defendant.

CONCLUSION OF LAW

The plaintiff has failed to offer any evidence to support his claims of breach of contract, invasion of privacy and misrepresentation and, accordingly, a judgement is hereby awarded in favor of defendant Monsanto.

Motion for a new trial denied.

## ISSUES TO BE PRESENTED

1. Did the fringe benefits for which the employee became eligible by illness prior to termination of the contract continue after the termination of the contract?

   A. Were there errors at the trial in interpreting the contract?

2. Was the lower court in error in excluding expert testimony of the witnesses?

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ARGUMENT

ISSUE I

Answer: The right of the employee to sick pay vested prior to the termination of the contract and continued for one year or until it was shown that the employee had recovered from the illness. Mere unsuccessful attempts of the employee to return to work, under the circumstances, were insufficient to relieve the employer of his contractual obligation.

Errors were committed by the lower court in interpreting the contract.

Contract termination does not terminate vested fringe sick pay benefits.

THE CONTRACT

The contract was introduced into evidence (Plaintiff's Exhibit 3) along with a written booklet describing the pay fringe benefits; an accounting value of the fringe benefits on a particular day was shown (Plaintiff's Exhibit 4). More specifically the pay claimed was shown as 1. a and b. of Plaintiff's exhibit 5 (the drawing principally refers to sections 2 to 4).

The contract and papers speak for themselves clearly indicating that the fringe benefits were part of the consideration and had a monetary value; further the testimony indicated that the fringe benefits were relied on by the employees and in particular Mr. Kucia.

The measure of maximum damages (not considering exemplary damages) is to return the employee to a condition such that

the contract had not been breached.

Exhibit 104, a copy of the employee's income tax business record, shows a loss of wages of at least $5400 in 1965 and the same loss in 1966 with a $1,000 loss in wages in 1967 for a total wage loss of $11,800; the actual loss was about double that shown in the income tax form schedule. Clearly the loss was beyond the amount of one year's sick pay less Workmen's Compensation recovery.

To assert that the sick pay benefit terminated with the contract is sheer nonsense argued by the corporation's lawyer which would permit vested rights to be lost whenever either party expected a loss or unfavorable position. The contract specified certain vested rights of the corporation to survive termination and it is not at all understood why the vested right of the employee would not also survive termination of the contract. Further the corporation lawyer erroneously argued and confused the court by asserting the corporation could unilaterally change the pay when the contract expressly stated changes in pay by MUTUAL agreement.

The fact that the employee returned to his place of employment does not negate his illness. The old 19th century standard - if he can walk, talk and sit, he is cured - was applied by both the corporation and the judge, in spite of the fact that the employee was submitting medical bills to the employer for payment. Page 3 of Plaintiff's Exhibit 7 signed by U.S. Supreme Court recognized experts sets forth that about

4½ years later the injury symptoms still persist but under favorable conditions he can now work successfully.

TABLE I

| January 1, 1965 | Before | After |
|---|---|---|
| Sick Leave | 1 to 2 days/year | 1.5 yrs. followed 8 or more days per year |
| Hospital | 1939- tonsilitis 3 days | 1965- Bronchitis 10 days |
| Prescription (Drugs) | Below National Average | 3 or more times National Average |

The employee requests the court to take JUDICIAL NOTICE of health laws, (42 U.S.C. 269, 6 D.C. Code 119) which permit the committment of persons who are able to walk, talk and sit to hospitals for medical treatment if they have contagious respiratory diseases; the employee herein is different in only one respect from this standard - his severe bronchial condition was not considered contagious.

At any time in early 1965, the corporation could have obtained a medical examination of the employee by their doctor; this was not done. The employee's medical evidence, Exhibit 109, and extrinsic facts indicate that the employee had not recovered from the illness although optimistically it was hoped he could return to his occupation.

Why should the employee be punished because he attempted to return to work? The decision below effectively punishes the conscientious employee - contrary to the interests of both the employee and the corporation.

At page 89 of the transcript of the proceedings the lower

court indicated that occupational illness pay was only recoverable - provided the illness is the reason for the separation. This is clear error as there is no such wording in 1(b) nor can said wording be interpreted from the contract.

The words, absent from work as the result of an occupational disease, state nothing in support of the lower court's interpretation. The contractural terms speak for themselves and nowhere is support for the lower court's interpretation of the contract apparent.

As a result of the illness the employee could not measure up to the standards of the employer; hence his absence from work was as a result of an occupational disease. Whether said absence is in the form of separation or another form is not especially pertinent once the absence has been established as it was in the proceedings below.

An interpretation of written documents by the District Court is a question of law and the court is not bound by any clearly erroneous restrictions.

* United States v. John McShain Inc., 103 U.S. App. D.C. 328, 258 F 2nd 422 (D.C. Cir. 1958) certiorari denied 358 U.S. 832. 79 S. Ct. 52, 3 L. ed 2nd 70.

ARGUMENT

ISSUE II

Answer: The lower ccurt ccmmitted errors in not recognizing the witnesses also were expert as tc certain matters; furthermcre the lower court erred in excluding Plaintiff's Exhibits 2, 8 and 9.

PROPERTY

An expert is one whc has acquired knowledge, skill or understanding of certain facts beyond the average man by study or practical experience. Farris v. Interstate Circuit, 116 F 2nd 412.(1940).

Reference as to admissibility should first be made to the state, Hope v. Hearst Consolidated Publicatcns, 294 F. 2nd 681 (C.A. 2, 1961) and the state of law as tc substantive matters under these circumstances is Texas. The only requirement for admissability of testimony of expert is that he is shcwn tc be qualified to testify as to subject on which he is called to testify. Witness who knows market value of prcperty in questicn is prima facie qualified to testify as *tc the value of the property. Housing Authority of City of Galveston v. Henderson, 267 S.W. 2nd 843 (1954). Further note Currey v. Ingram, 397 S.W. 2nd 490 (1965) sets forth land owners are competent tc testify as tc value of land.

Many of the facts occured in Galveston County, Texas which was also the location of the house and plant.

Further under Texas Civil Statutes at Section 6573 a license is required to sell real estate; however both the

owners of the property and attorneys are exempted from the requirement under sub-section 6 of 6573; thus the State of Texas recognizes the right and ability of various persons to handle property.

Both witnesses could testify as to the expected loss on the property with the employee being doubly qualified as an attorney in Texas and as a property owner; both witnesses were consistent in claiming the loss as about 10 percent of the property value.

In order to remove any doubt as to the loss, there was further testimony that it cost money to buy the house, business record evidence was offered to show it was costing the employee money to rent the house (exhibits 102 and 103); furthermore it was shown for a time two households were maintained with losses naturally flowing therefrom.

Monsanto could terminate the contract but the pay due their employee including vested interests had to be paid to him; furthermore losses resulting from reasonable reliances by the employee on representations of the employer were also due him. This was part of the cost to the employer for terminating the contract; the cost to the employee was the loss of his livelihood including occupational abilities, experience and training including loss of several years of his life.

EMPLOYMENT

On page 63 of the transcript the employee's attorney attempted to obtain an expert opinion from the employee after obtaining the following qualifications; B.S. degree in

Chemical Engineering from Purdue, a Doctor of Jurisprudence degree from the University of Houston with over ten years practical experience as a Chemical Engineer. The employee is also a member of the Texas Bar, and a member of the American Chemical Society and is certified by the U.S. Government as having legal competence (Exhibits 8 and 9) as a Patent Examiner in Chemical Engineering. Further his wife previously testified he had actual experience on the questioned subject matter - employment availability in 1965.

The lower court after stating that "I don't know who would be in a position to testify to that" excluded the question. In the light of the established qualifications of the employee such was error.

The employee was trying to testify to the conditions of the employment market in his field at that time as shown in Exhibit 107 that jobs were plentiful in his field in 1965 with an unemployment rate in the neighborhood of less than ½ of 1 percent yet employment was unavailable to him; strong circumstantial evidence which supported that he was considered either ill or blackballed in the employment market either of which would entitle him to recover damages herein. Alone, such circumstance was not compelling but when coupled with the other evidence the conclusion was inescapable that the employee was not considered employable in 1965.

The lower court failed to recognize that the employee had qualifications and experience far above that of others.

He had actually studied the market, he tried to obtain

employment, he studied the statistical services of technical crganizations such as the American Chemical Society, Bureau cf Labcr Statistics and he alsc had a hindsight evaluatien of the pericd in questicn. The emplcyee shculd have been permitted tc testify and nct permitting him tc give his expert opinion was clearly prejudicial errcr which ccmbined with other errcrs led tc the final ccnclusicn that nc evidence had been presented.

In the trial cf a ncn-jury case it is virtually impossible fcr a trial judge tc ccmmit errcr by receiving inccmpetent evidence, Builders Steel Cc. v. Commissicner, 179 F 2nd 377, 379 (8th Circuit 1950). Why was the evidence excluded? Why did the lower ccurt permit the emplcyer's attorney to censcr the evidence?

If this was a jury case, where was the jury? If it was nct a jury case, the evidence shculd have been admitted subject tc being later stricken frcm the recerd.

Fcr example at the middle cf page 43, in reply to a questicn about whether cther emplcyees received fringe benefits, the Ccurt summarily dismissed a prcper answer

. . . . I was tcld, lcst a . . . .

At first glance this answer might seem imprcper but upcn further explanatien it wculd nave been learned that the persen telling us (emplcyees) was a management official cf high standing within the ccrpcration actually verbally representing tc several emplcyees including Mr. Kucia that anctner salaried emplcyee lcst a lung but was receiving full

salary under the fringe benefit provisions herein disputed. Said representation was highly pertinent to the case regardless of the truth or the injury to the employee, yet such evidence was censored before the judge even learned enough about the answer to determine its applicability. Such incidents were repeated. Why all the censorship? Why did the lower court co-operate with the corporation's lawyer in censoring the evidence?

TABLE II

| | Corporation Lawyer | Employee Lawyer |
|---|---|---|
| pre-trial | refused to cooperate | requested stipulations |
| Trial evidence | about 25 objections | cooperated with Judge, no objections |

The effect of the censorship is to cheat other corporations (the insurance industry) out of a greater volume of business, to cheat injured employees out of compensation for injuries, to give this corporation a competitive advantage over other chemical corporations by permitting them to pollute the atmosphere.

Mrs. Kucia having two years of nurses training besides high school followed by years of practical experience at a medical foundation in addition to her practical experience of raising a family including her knowledge of her husband testified HER HUSBAND CAME HOME FROM WORK ILL.

Independently the doctor arrived at the same conclusion, note Exhibits 108 and 109, yet the evidence and natural inferences therefrom were completely ignored. The lower

ccurt cculd draw the inference that since he attempted to return tc wcrk he was nct ill yet evidence tc the ccntrary was excluded as hearsay with the evidence that did ccme in ccmpletely ignored. Dcctcrs reccrds including business letters tc the Industrial Accident Bcard, a stack cf medical bills in the emplcyer's pcssessicn abcut a fcot high were ignored with the tctal medical bill running intc thcusands cf dcllars. The natural inference [when an emplcyee wcrks among such chemicals, returns frcm wcrk sick, when the Texas Wcrkmen's Ccmpensaticn law states that such chemicals cause cccupaticnal illness, (Article 8306, sectien 20, Texas Civil Statutes), when he is unable tc prccure emplcyment, when he flunks ccurses in ccllege fcr the first time in his life, when the dcctcr (under cath) after 40 visits testifies that chemicals caused the illness] is that chemicals caused the emplcyee tc suffer an cccupaticnal illness.

* In St. Louis B.&M. Railrcad Cc. v. Davis, 262 S.W. 923, 927 (C.A. Galveston, Texas 1924) plaintiff sister's testimcny, after injury tc his physical ccnditicn, was admissable when she saw him four days after injury and nursed him. She had previcus training as a nurse fcr 18 mcnths. Mrs. Kucia's testimcny was mcre highly pertinent, more timely, she had better qualificatiens, yet her medical answers were stricken with the answers that did ccme intc the reccrd ccmpletely ignored as nc evidence even when fully ccrrcbcrated by the exhibits, circumstances and other testimony.

It appears ccmmcn sense was ccmpletely ignored in the

ccnfusicn and censcrship raised by the ccrpcraticn's lawyer fcr their Greedy advantage.

When Exhibit 2 was shown tc Mrs. Kucia, the lower ccurt suggested that it be held in abeyance until the emplcyee cculd testify; later it was refused intc evidence cn the basis that a prcper fcundaticn had nct been laid yet scmehcw the lcwer ccurt cverlccked that Mrs. Kucia was attempting tc lay the fcundaticn when the evidence was sidetracked. The letter was a business letter in the ccurse cf the emplcyee's prcfession and was properly admissable as such.

Evidence of nefarious activities such as blackballing and ccnspiracy is difficult to lccate since persons invclved in such endeavcrs are generally highly scphisticated; such endeavcrs often have tc be prcved using varicus pieces of circumstantial evidence - unless cne is lucky encugh to cb- tain ccngressicnal investigaticn - and circumstantial evi- dence should be admitted subject tc a shcwing cf sufficiency cf facts and evidence in suppcrt cf the allegaticns.

Exhibits 8 and 9 were nct entered as superflucus which wculd have been perfectly prcper except that the lcwer ccurt then ignored the expertise cf the emplcyee - such evidence cf ability was prcper under these circumstances and should have been entered. It was errcr tc exclude the evidence as super- flucus and later determine essentially that the emplcyee was not expert - a determinaticn inconsistent with the excluded evidence.

ARGUMENT

ISSUE III

Answer: The lcwer ccurt was in errcr in excluding previously established undisputed facts and evidence in the Wcrkmen's Ccmpensaticn prccedure.

It is the essence cf res judicata that an end should be put tc litigaticn. It is nct seen why previcusly established facts and evidence shculd have tc be repeated in a subsequent suit fcr a different cause cf acticn; such repetitien needlessly multiplies the ccst cf litigaticn and adds ncthing to the basic facts. As stated by Mr. Justice Harlan in Scuthern Pacific Railrcad v. U.S., 168 U.S. 1, 81 S. Ct. 18, 42 L. ed. 355 (1897).

> . . . and even if the second suit is fcr a different cause cf actien, the right, questicn or fact cnce sc determined must, as between the same parties cr their privies, be taken as ccnclusively established . . .

After a trial went tc the jury and after a new trial was granted, the Texas Judge apprcved a ccmprcmise settlement cf cver seventy week duratien; it would be clearly inccnsistent with the previcus decisicn and events tc deny recovery herein. A judgement based cn a ccmprcmise is not res judicata as tc an actien fcr a later pericd althcugh it is as tc the pericd ccvered by the ccurt, Clark v. U.S., 281 F 2nd 446 (1960).

Exhibit 106 sets fcrth the previcus claim was brought against the employer and as per the Texas prccedure the corpcratien's privy, insurance company, then handled the claim.

There was nc dcubt that the medical evidence was sufficient at the Wcrkmen's Ccmpensaticn suit; sc cbvicus the question wasn't even raised since the case went tc the jury. If any questicn had been raised, a subpcena wculd have been cbtained cne hcur later the Texas Ccurt wculd have had the stack of medical bills in possessicn cf the ccrpcraticn's Texas insurance claims department.

Details as tc the medical bills are set fcrth in the pre-trial statement shown in the Appendix.

Although opinion evidence cf the dcctcr wculd have been subject tc cross-examinatien, medical records, letters and established bills are clearly facts which have already been established, ncte Exhibits 105, 108, 109, 112 and 113; which suppcrt the employees testimony that the ccrpcraticn had agreed tc pay the medical bills under the medical insurance fringe benefit, but $290 in unpaid checks was still outstanding. Said medical facts already long established shculd have been acknowledged by the lower ccurt thereby avciding needless expensive duplicatien cf effcrt; nct acknowledging previously established facts has needlessly prclcnged the litigatien as the ccrpcraticn's lawyer well knows and has engendered ad-diticnal litigatien. (actual fact)

Extrinsic details, that the previcus suit was settled for seventy weeks ccmpensatien and that the corpcraticn's cwn witnesses wculd have added factual details, althcugh nct at all ccnclusive are difficult tc ignore in view cf the

ccrrcbcrating evidence.

Hence, the summary judgement in favcr cf the ccrpcratien appears tc be clearly in errcr.

ARGUMENT

ISSUE IV

Answer: The findings cf fact were unsuppcrted by substantial evidence, they were against the clear weight cf the evidence and were induced by an errcneous view cf the law.

FACT 3

Page 2 cf the transcript reveals that ncne cf defendant's exhibits were put intc evidence sc all that is cf reccrd is the emplcyer's allegaticns and arguments such clearly being insufficient in the face cf the circumstances and evidence cf the employee put into the record.

FACTS 4 AND 5

On page 44 under cath the emplcyee testified $290 wcrth cf checks under the insurance fringe benefit were unpaid; furthermcre the testimony was suppcrted by Exhibits 112 and 113 alcng with pre-trial Exhibit 21. The checks were in the emplcyer's possessicn with absclutely no evidence the checks had been paid. It is clear that the insurance medical benefit was in effect as tc the emplcyee (bcckiet, testimony, etc.). The finding was clearly errcnecus.

Furthermcre, it was established in the reccrd that the fringe sick pay benefit was due, Exhibits 4 and 5, that the emplcyee was ill alcng with the circumstances that when he tried tc return tc wcrk his jcb perfcrmance was inadequate and he cculd nct cbtain emplcyment elsewhere. The findings

4 and 5 are clearly erroneous in view of the reasonable inference that he was also ill at the time of separation; furthermore said inference is supported by medical evidence in the corporation's possession, bills, etc., along with Exhibit 110.

FACT 6

Starting at the bottom of page 15 of the transcript Mrs. Kucia testified the employee came home from work ill; he was ill for some time (middle of page 17); he was in the hospital (page 18); stayed home about two weeks thereafter; he returned to work but required rest and medical treatment (top of page 19); he was not employed from April 1965 until about September 1966 even though he tried to obtain employment (page 20). At the middle of page 34 the employee testified as to the fringe benefits and the work was hazardous. On page 44 the employee testified to his illness and medical bills. On page 46 the employee testified as to the irritation of his bronchi et al which led to BRONCHITIS; on page 47 the employee described the environment especially noting the employees reference to FUMING SULPHURIC ACID; on page 48 the employee described the medical treatment but was not able to fully describe the circumstances (middle of page 48) of his attempt to return to work; however his condition is fully described at the top of page 50 which is the typical treatment for respiratory problems of this severe nature i.e. plenty of rest as in treating tubercular conditions along with medication. At page 51 of the transcript the

emplcyee described his efforts tc obtain other emplcyment. Further page 3 of Exhibit 7 sets forth even 4½ years later the consequences persisted.

Somehow from this testimony it was decided that the attempt tc return tc work was sufficient tc show the employee was cured; ATTEMPTS TO EXPLAIN THAT THE DOCTOR ADVISED THE EMPLOYEE TO TRY TO RETURN TO WORK WHILE STILL UNDER MEDICATION TO SEE WHAT WOULD HAPPEN WERE CENSORED AS HEARSAY; the consequences of the emplcyee's returning tc wcrk are indicated in Exhibit 109, that is the illness became worse fcllcwed by his separatien.

After some 40 visits cver 1½ years including hcspitalization cf the emplcyee the dcctcr testified that chemicals caused the illness, note business letter cf the dcctcr, Exhibit 108. Everybody (but the Judge and the corporation's lawyer) including the employment community knew that the respiratory illness made the emplcyee unemplcyable.

Actual testimony and reascnable inferences therefrom clearly show fact 6 is in error.

FACT 7 and 8 to 10

The errors in excluding Exhibit 2 and in excluding expert testimony of the emplcyee as tc the state of the emplcyment market, ncte Exhibit 107, effectively deprived the emplcyee cf a fair trial on the issues cf blackballing and invasicn of privacy, and clcsed the door tc further testimcny.

FACTS 12 and 13

The very circumstances of a ycung new resident emplcyee trying tc cbtain a lcan fcr ccnstruction and purchase cf hcmestead property raises the natural inference that the mcrtgage company checked out his emplcyment status; further ncte Exhibit 101 alcng with testimcny in the depcsiticn including answer tc intercgatcries.

Findings cf fact 3 tc 8, 10, 12 and 13 are errcneous with fact 9 being in errcr because cf exclusicn of testimcny. The ccnclusicn cf law is clearly errcneous in that evidence was cffered and the evidence which came in was ignered.

Clearly evidence was offered but was censered, and ccnfused by the clever suave tactics cf the ccrpcraticn's lawyer intc leading the lower ccurt intc errcr; hence the ccnclusicn cf law is withcut basis and clearly contrary tc the weight cf the evidence.

ARGUMENT

ISSUE V

Answer: IT WAS A CLEAR ABUSE OF JUDICIAL DISCRETION TO DENY THE MOTION FOR A NEW TRIAL. In addition to the evidence actually presented reference was made to the interrogatory answers along with the deposition including offering to present additional evidence. The court abused its discretion in not granting the Motion For A New Trial, it is not seen how justice is served by permitting a lawyer to fail to engage in pre-trial stipulations including confusion, harassment and continuous objections at a trial. It is not seen that justice is served because an attorney fails to ask questions of witnesses already answered in interrogatory answers and the depositions amid the confusion and pressures of a trial.

The Court of Appeals has the power to reverse the lower court's decision, refusing to grant a new trial. Under certain circumstances it is a matter of law - not judicial discretion - to grant a motion for a new trial.

Mr. Wright in the Doubtful Omniscience of Appelate Courts in 41 Minnesota Law Review 751, 760 (1957) criticized the District of Columbia Court of Appeals for claiming the power to reverse on a Motion For A New Trial in dictum; nevertheless the dictum became law in Georgia Pacific Corp. v. U.S. at 264 F 2nd 161, 5th circuit (1959). Discussed by Cound, et al. in Civil Procedure, West Publishing Co., St. Paul, Minn. (1968) at page 892.

The lower court in considering the new trial motion clearly erred in not observing that the motion brought the answer to the interrogatories and the deposition before it. At page 4 of the Interogatories the answer was clearly contrary to findings 12 and 13; further note exhibit 101. There are other examples of clear errors in the Findings when the evidence under oath in the file is considered.

Further additional evidence was offered. It is not seen that it is in the interests of justice to deny a valid claim simply because an attorney failed to go through the Interogatory Answers and Depositions to remind him of the questions to be asked.

Sometimes it is a burden to grant a new trial with the costs falling on the other party; however in this instance it is quite clear that the corporation put an excessive burden on the employee at pre-trial, note the pre-trial examiner's statement, including numerous objections and confusion at the trial. Rule 37(c) et al. of Federal Rules of Civil Procedure provides the answer as to whom the cost of such proceedings shall fall.

## SUMMARY

Errors including interpretation of the contract, exclusion of expert testimony, exclusion of testimony, exclusion of exhibits, exclusion of previously established facts and evidence amid confusion engendered by the corporation's lawyer resulted in an erroneous decision which effectively deprived the employee of the right to a fair trial.

The sick pay fringe benefit vested and wasn't cancelled by termination of the contract and/or the unsuccessful attempt of the employee to return to work.

Although the corporation could terminate the contract, losses resulting from reasonable reliance on the representations of the corporation became due.

No reason was shown below why the fringe benefit, medical insurance, paid to the employee in the form of checks should not be paid.

## RELIEF REQUESTED

The following relief is requested:

JUDGEMENT FOR

A. Sick pay for April through September 20, 1965 based on the employee's salary plus the value of the fringe benefits less $35/week Workmen's Compensation recovery. The actual determination of pay to be made by the employer's payroll acccunting department, said determination to be final unless clearly in error;

B. $2,000 as the reasonable loss on the purchase of property on representations of the employer plus about $290 in unpaid checks in the employer's possession.

C. The lower court's determination is reversed with the questions of Invasion of Privacy dismissed without prejudice to the employee's right to resubmit said issue to a determination based on evidence consistent with the Court of Appeals opinion.

D. Costs to the defendant.

E. Interest from September 1965 at a rate of 6% per annum on the amount recovered.

ALTERNATIVELY

F. REVERSED AND REMANDED.

NOTE

Estimated value of A, B and E, $4500 plus $2,290, plus interest.

SUPPLEMENT

FACTS SUPPORTING JUDGEMENT FOR PLAINTIFF

In addition to facts 1 and 2 already determined are the following:

3. About September 1963 the employee was transferred to Texas.
4. In February of 1964, the corporation represented to the employee in writing his employment was relatively permanent.
5. Acting on reliance on written and oral representations, the employee entered into a long term agreement, June 1964 with losses resulting therefrom early separation from employment.
6. The employee was transferred to another work area where respiratory problems started.
7. At the end of December 1964, the employee contacted chemicals and returned home from work ill.
8. After medical treatment, the employee was hospitalized toward the end of January 1965.
9. Almost immediately after returning to work and shortly after the employee's long term agreement, his employment was terminated.
10. The evidence adequately supports that the illness took a long time to recover from.
11. The employee was unable to find employment.
12. He was available for work until he returned to school

as a full time student in September 21, 1965.

CONCLUSION OF LAW

13. The sick pay was part of the employee consideration, vested prior to the termination and continued after termination.

14. The checks were part of the fringe benefits which the corporation agreed to pay with no evidence relieving the corporation of their liability to pay.

15. A prima facie case having been established with both witnesses testifying the corporation had not furnished or taken any medical examination, the corporation does not have any sound medical basis for denying that the employee had an internal injury - especially in view of the established facts and circumstances.

OPINION

It appears a prudent corporation would have obtained a thorough examination of the employee in March of 1965; failing to do so they have no sound medical basis for denying the basic claim in view of the facts and natural inferences from the circumstances.

Hence, the judgement goes to the employee.

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* Indicates authorities chiefly relied upon.

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,487

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RICHARD R. KUCIA,

*Appellant,*

v.

MONSANTO COMPANY,

*Appellee.*

---

**Appeal from the United States District Court for the District of Columbia**

---

## BRIEF FOR APPELLEE MONSANTO COMPANY

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### STATEMENT OF ISSUES PRESENTED

1. Whether the trial court, in granting defendant's Motion for Judgment, properly determined that the plaintiff failed to present evidence to support his claims of breach of contract, invasion of privacy and misrepresentation.
2. Whether the trial court erred in ruling that the plaintiff and his wife were not competent to testify on matters requiring expertise.

---

This case has not previously been before this Court.

3. Whether the trial court erred in striking the plaintiff's claim for physical illness allegedly contracted as a result of and during the course of his employment with the defendant.

4. Whether the trial court erred in denying plaintiff's Motion for a New Trial.

## COUNTERSTATEMENT OF THE CASE

This is an action to recover damages for breach of employment contract, invasion of privacy, and misrepresentation. The plaintiff, Richard R. Kucia, also sought to recover from his employer, defendant Monsanto, damages for illness and injuries which he alleges were sustained during the course of his employment. The trial court, in a pretrial proceeding, granted defendant Monsanto's motion to strike the claims for illness and personal injury arising out of his employment on the ground that the Workman's Compensation law was the exclusive remedy for those claims.

Mr. Richard R. Kucia is a graduate of Purdue University, receiving a BS degree in Chemical Engineering (Tr. 28). He was first employed by defendant Monsanto as a chemical engineer on September 19, 1960 (Tr. 29). The written contract between the parties provided that his employment would continue until terminated by either party at any time upon 90 days' written notice (plaintiff's Exhibit #3). Mr. Kucia was initially employed in Arkansas and then transferred to Monsanto's research facility at St. Louis, Missouri (Tr. 30). While living in St. Louis, Mr. Kucia enrolled as a night student at the St. Louis University School of Law (Tr. 64).

In September, 1963, Mr. Kucia was transferred to Monsanto's Texas City, Texas plant to continue his work as a research chemical engineer. Shortly thereafter, he and his wife purchased a home, which they continue to own (Tr. 21). Mr. Kucia also enrolled as a night student

for the fall semester (1964) at the University of Houston Law School (Tr. 63). It was then his intention to become a member of the Monsanto Patent Law Department upon his graduation from law school (Tr. 66).

Mr. Kucia's work at the Texas City plant was that of a research chemical engineer (Tr. 68). He was initially assigned to a research group headed by Dr. Okamoto. During the period of September 1963 through September 1964, Mr. Kucia submitted his work to Dr. Okamoto and received periodic counseling from him (Tr. 68). Throughout this period, Dr. Okamoto advised Mr. Kucia that his work was below average and inadequate (Tr. 45, 46). And, according to Mr. Kucia, his performance ratings went "from bad to worse" (Tr. 45).

In September 1964, Mr. Kucia was advised by his project supervisor, Dr. Lane, that because of his poor performance over the previous year, it was necessary for him to be placed on six-months' probation. (Tr. 70, 71). If at the end of that period his performance did not improve, he would be asked to resign (Tr. 72). Dr. Lane further stated that Mr. Kucia would be transferred into another research group headed by Mr. Roth (Tr. 71). Dr. Lane advised Mr. Kucia that he would no longer be considered for a position in Monsanto's Patent Law Department and that his performance during the forthcoming six months would be based solely upon his work as a research chemical engineer (Tr. 72).

From September, 1964 through March 31, 1965, Mr. Kucia worked under the supervision of Mr. Roth. During this period he continued to attend classes at the University of Houston Law School (Tr. 73). In late January and early February, 1965, Mr. Kucia was absent from work due to an illness (Tr. 48). He returned to Monsanto on or about February 15 and worked regularly until he was terminated on March 31, 1965 (Tr. 49). During the period of his illness, Mr. Kucia attended night school and took his semester examinations (Tr. 74, 75).

At the end of the six month probationary period, Mr. Kucia was advised by Dr. Lane that his work had not improved, and, accordingly, it was necessary to terminate him (Tr. 76). Mr. Kucia received written notice of that termination from Dr. Lane and was given 90 days' advance pay as required by the contract of employment (Tr. 77, 78). He also received compensation reflecting accrued vacation and continued to receive medical benefits which accrued during his employment (Tr. 78).

Immediately following his termination by Monsanto, Mr. Kucia sought to obtain employment as a chemical engineer (Tr. 78). He sent resumes to approximately a dozen prospective employers and continued his legal education at the University of Houston. In September, 1965, Mr. Kucia became a full-time law student, and continued in that status until he received his law degree in June, 1965 (Tr. 80). He subsequently was admitted to the Texas Bar (1966) and obtained employment as a Patent Examiner in Washington, D. C. (Tr. 29, 52).

## STATUTES INVOLVED

Federal Rules of Civil Procedure:

RULE 52. FINDINGS BY THE COURT

> (a) Effect. In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

> (a) Grounds. A new trial may be granted to all or any of the parties on all or parts of

> the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. . . .

## SUMMARY OF ARGUMENT

The trial court properly granted defendant Monsanto's Motion for Judgment in that the plaintiff failed to produce at trial any evidence to support his claims for breach of employment contract, invasion of privacy and misrepresentation. Mr. Kucia's absence from work subsequent to March 31, 1965 was due solely to his failure to perform his work within the prescribed standards set by Monsanto.

The record clearly indicates that for the year-and-one-half period prior to his termination by Monsanto, Mr. Kucia was repeatedly advised of the substandard quality of his work. Six months prior to his termination, Mr. Kucia was advised that he was to be on probation and that if the quality of his work product did not improve, he would be terminated on March 31, 1965. The quality of Mr. Kucia's work product did not improve, and in accordance with his written contract of employment, Mr. Kucia was given written notice of his termination, received 90 days' advance pay, accrued vacation pay and various medical benefits. And immediately following his discharge, Mr. Kucia undertook to obtain employment elsewhere as a chemical engineer. The record is devoid of any evidence to support the plaintiff's claim that his absence from work after March 31, 1965 was due to illness or injury. Nor is there any evidence that Mr. Kucia was unable to work as a chemical engineer after that date. Indeed the evidence is to the contrary. Mr. Kucia worked regularly for six weeks prior to his discharge and immediately sought employment as a chemical engineer upon his discharge.

The trial court also properly exercised its broad discretionary powers in excluding Mr. and Mrs. Kucia's testimony on matters requiring expertise and in denying the plaintiff's Motion for a New Trial. Mrs. Kucia lacked the requisite medical training to render an opinion on the cause of her husband's illness. Similarly, Mr. Kucia lacked the skill and training necessary to render an opinion regarding employment markets and property values. Further, had this "expert" testimony been admitted, it would have been irrelevant to the principal issues in the case.

The plaintiff's Motion for a New Trial did not raise any manifest errors of law or mistakes of fact. Its primary thrusts were aimed at vilifying both trial counsel. The additional evidence which Mr. Kucia sought to offer was available to him on the day of trial. To now allow a new trial would place a premium on inadequate preparation and result in relitigation of issues previously tried by the Court. The record demonstrated that Mr. Kucia had five years within which to prepare his case and it was not an abuse of discretion for the trial court to deny the plaintiff's Motion for a New Trial.

## ARGUMENT

### I. The Plaintiff Failed to Produce Evidence to Support His Claims of Breach of Contract, Invasion of Privacy and Misrepresentation, and, Accordingly, the Trial Judge Properly Granted Defendant's Motion for Judgment.

Rule 52 of the Federal Rules of Civil Procedure provides that in all actions tried without a jury, the court shall find the facts specially and state separately its conclusions of law. The trial court, after trial of the issues and introduction of evidence by the plaintiff, concluded that the plaintiff had failed to produce evidence to support his claims of breach of contract, invasion of privacy and misrepresentation. The court specifically found that

the plaintiff received all of the benefits he was entitled to under his contract of employment with the defendant; that there was no evidence that the defendant invaded the privacy of the plaintiff; and that the plaintiff failed to present any evidence to support his claim of misrepresentation. Based upon those findings of fact, the court concluded that the defendant was entitled to a judgment in its favor.

The findings of fact made by the trial judge are not to be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Federal Rules of Civil Procedure. It is not the function of an appellate court to retry the case on appeal. The findings of fact by the trial judge are presumptively correct and will not be set aside unless clearly erroneous or based upon an erroneous view of the law. *Coleman* v. *United States*, 85 U.S. App. D.C. 145, 176 F.2d 469 (1949). See generally, 2B FEDERAL PRACTICE and PROCEDURE § 1130 (Barron & Holtzoff 1961). And it is the plaintiff's burden to show that the trial court's findings are clearly wrong. *Bellevue Gardens, Inc.* v. *Hill*, 111 U.S. App. D.C. 343, 297 F.2d 185 (1961). Emphasizing the limited scope of appellate review under Rule 52(a), then Circuit Judge Burger stated: "To demonstrate that findings of fact of the trial court are 'clearly erroneous' under Rule 52(a) . . . imposes a heavy burden on those who seek to set them aside." *Id* at 345, 297 F.2d at 187. The record in the present case clearly demonstrates that Mr. Kucia did not present any evidence to support his claims against Monsanto Company.

***Breach of Contract***

The terms of Mr. Kucia's employment with Monsanto Company are contained in the contract of employment dated September 19, 1960. The contract provides that it may be terminated by either party at any time upon

90 days' notice in writing. The evidence produced at the trial clearly demonstrated that the plaintiff's employment with Monsanto Company was terminated because his work was unacceptable and below the standards required of its employees by Monsanto Company. The evidence further demonstrated that Mr. Kucia received written notice of his termination, 90 days compensation, and various benefits including accrued vacation pay and medical payments of expenses incurred during his employment. Based upon that showing, the trial court correctly concluded that Monsanto complied with all of the terms and conditions of the employment contract and that the plaintiff failed to present evidence that the contract was breached.

Mr. Kucia asserts that Monsanto breached the contract in that it failed to furnish him with his full salary following termination of his employment. This conclusion stems from the further assertion that his absence from work after March 31, 1965 was not due to his termination by Monsanto, but because of sickness. The only evidence in the record relating to these claims is the testimony of Mr. Kucia and his wife that during portions of January and February Mr. Kucia was ill and unable to work. There is, however, not a scintilla of evidence that the plaintiff's absence from work after March 31, 1965 was the result of either an occupational or non-occupational sickness or accident. To the contrary, the evidence is clear that Mr. Kucia for the year and half prior to his termination was not performing his work satisfactorily. He was counseled repeatedly by his supervisors to improve his work product and warned that he would be terminated on March 31, 1965 if his work did not improve. During the six week period prior to his termination, Mr. Kucia worked full time as a research chemical engineer. And immediately upon his termination, he undertook to seek employment as a research engineer. Thus, there is substantial evidence in the record to support the trial court's conclusion that Mr.

Kucia's absence from work after March 31, 1965 was due solely to his poor work record and that Monsanto complied with all of the terms of the written contract.

***Invasion of Privacy***

The plaintiff's claim of invasion of privacy is without foundation in fact and wholly unsupported by the evidence introduced at the trial. The plaintiff's pretrial statement alleges that the defendant invaded his privacy in that it harrassed him and prevented him from obtaining gainful employment. The plaintiff further alleged that the defendant prevented his fellow employees from writing letters of endorsement, furnished the Patent Office with unfavorable recommendation for employment, and retained detectives and investigators who made persistent inquiries about him subsequent to his discharge. None of these claims was supported by evidence presented at the trial.

The plaintiff asserts that his claim of invasion of privacy was supported by a letter from a co-employee and friend. The letter was excluded by the court as not being relevant to the issues before it. The letter, written by a Mr. Norwood Ruiz, was in response to a request by Mr. Kucia that he write a recommendation to the Texas Supreme Court in connection with Mr. Kucia's application for admission to the Bar. Mr. Ruiz declined to make the recommendation on the ground that Mr. Kucia was then in litigation with Mr. Ruiz's employer. The purpose of seeking the recommendation was not to obtain employment elsewhere nor was there any evidence that Mr. Ruiz declined to make the recommendation due to the efforts of Monsanto.

Mr. Kucia further asserts that had he been allowed to testify that there existed a favorable employment market for research chemical engineers in the spring of 1965, the court could infer from his failure to obtain employment that Monsanto was seeking to bar him from future

employment. Even assuming the admissibility of that testimony, reasonable men could not possibly draw such an inference. For to allow such an inference would be to engage in unbridled speculation without any basis in fact.

The conclusion of the trial judge that there was no invasion of privacy is also correct as a matter of law. Texas, the state in which invasion of privacy is alleged to have occurred, does not recognize a "right of privacy." In *Milner* v. *Red River Valley Publishing Company*, 249 S.W. 2nd 227 (Tex. Ct. App. 1952), it was held that "The right of privacy as such not being recognized under common law, as it existed when we adopted it, and our Legislature not having given such right by statute, no recovery can be had in Texas. . . ." *Id* at 229. The 5th Circuit Court of Appeals, citing *Milner* held that "the law of Texas does not recognize a cause of action for a breach of a right of privacy. . . . The decisions of Texas Courts have foreclosed any cause of action based on the invasion of privacy. . . ." *McCullagh* v. *Houston Chronicle Publishing Co.*, 211 F.2d 4 (5th Cir. 1954). Accordingly, the trial court correctly granted the defendant's Motion for Judgment on this issue.

***Misrepresentation***

The plaintiff has alleged that the defendant was guilty of misrepresentation in that at the time of his employment the defendant represented that his employment would be steady. The plaintiff further asserts in the pretrial order that based upon that representation, he purchased a lot and house near the Texas City, Texas plant. The conclusion of the trial judge that there was no evidence presented on this issue is substantiated by a review of the trial proceedings. The employment contract executed by the plaintiff and introduced by him at the trial conclusively demonstrates that Monsanto was not perpetually bound to employ the plaintiff.

The plaintiff asserts, however, that the purchase of his home raised the inference that the mortgage company was told by Monsanto that Mr. Kucia was a fulltime employee. Assuming the correctness of this inference, the plaintiff has, nevertheless, failed to present any evidence of misrepresentation. The home was purchased in February, 1964. It was not until March of 1965, or more than one year subsequent to the purchase that his employment was terminated. Even if it were further assumed that evidence was presented that such representations were made, the plaintiff still has failed to proffer evidence that a misrepresentation of a material fact occurred. A statement that the plaintiff's employment would be steady is one of opinion and cannot serve as a basis for an action of misrepresentation. PROSER, TORTS (Hornbook Series) 736 (3rd ed. 1964). In addition, if the statement is to be construe as one of fact, the plaintiff did indeed have steady employment with the defendant for more than a year after the statement was made. Thus, not only has the plaintiff failed to present evidence of statements of fact made by the defendant, but he has also failed to state a claim upon which relief can be granted even if such statements were made.

**II. The Trial Court Properly Concluded that the Plaintiff and his Wife Lacked the Necessary Expertise to Give an Opinion which Would Help the Court in its Search for the Truth.**

The plaintiff through his own testimony and that of his wife sought to introduce expert testimony on the subjects of medicine, property values, and employment markets. The trial judge properly excluded the testimony on the ground that the witnesses were incompetent to render an opinion which would be helpful to it in determining the issues.

Determination of the competency of a witness to testify is left to the discretion of the trial judge. Rule 43

(a), Federal Rules of Civil Procedure. His decision to exclude the witness's testimony will not be set aside unless it is clearly erroneous. 2B FEDERAL PRACTICE and PROCEDURE § 965 (Barron & Holtzoff 1961).

To warrant the use of expert testimony, two elements must be present. First, the subject must be so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average layman. Secondly, the witness must have such skill, knowledge or experience in that field or calling to make it appear that his opinion or inference will probably aid the trier in his search for truth. The qualifications of the expert is a matter for the trial judge's discretion, reviewable only for abuse. *Sher* v. *DeHaven*, 91 U.S. App. D.C. 257, 199 F.2d 777 (1952); *Pollard* v. *Hawfield*, 83 U.S. App. D.C. 374, 170 F.2d 170 (1948). See generally, McCORMICK EVIDENCE § 13 (Hornbook Series 1954).

The plaintiff asserts it was error for the court to refuse to allow Mrs. Kucia to give expert medical testimony. Mrs. Kucia received two years of student nursing training prior to her marriage in 1956. Since that time, she has had no other medical training or education which would qualify her to give an expert opinion on a medical issue. The court correctly concluded that she was not competent to render an opinion as to the cause of her husband's illness based upon her training as a student nurse and employment as a secretary at the Mount Sinai Medical Foundation.

Mr. Kucia also lacked the requisite skill, knowledge, or expertise in the fields of property evaluation and employment markets. However, even if we were to assume that the plaintiff was competent to give such testimony, it would be immaterial in view of the fact that the plaintiff's home was not sold nor would it be reasonable to infer, as the plaintiff asserts, that the availability of chemical engineering positions is evidence that the plain-

tiff's failure to obtain employment was caused by defendant's "blackballing" him.

### III. The Trial Judge Properly Struck the Plaintiff's Claims for Physical Illness Allegedly Contracted as a Result of and During the Course of His Employment with Monsanto.

Article 8306 of the Texas Statutes (Vernon ed.) provides that an employee's exclusive remedy for illness or injury sustained during the course of his employment is the Workman's Compensation law. Thus, the trial court properly concluded that the plaintiff was barred from asserting any common law claim for injury or illness allegedly contracted as a result of and during the course of his employment with the defendant. In addition, these claims were the subject of a Workman's Compensation proceeding which was ultimately settled between the parties. Hence, the plaintiff has no basis upon which to resurrect these claims other than for the purpose of harassing the defendant.

### IV. The Trial Court Did Not Abuse its Discretion In Denying The Plaintiff's Motion For A New Trial.

Rule 59(a) of the Federal Rules of Civil Procedure provides that a new trial *may* be granted in an action tried without a jury for any of the reasons for which rehearings had been granted in suits in equity. Petitions for rehearing must be based upon manifest error of law or mistake of fact, and the judgment should not be set aside except for substantial reasons. *Pioneer Paper Stock Co.* v. *Miller Transport Co.*, 109 F.Supp. 502 (D.C. N.J. 1953); *Solar Laboratories* v. *Cincinnati Advertising Products Co.*, 34 F.Supp. 783 (D.C. Ohio 1940). It is well settled that the granting or denying of a motion for a new trial rests with the sound discretion of the trial judge and his decision is not reviewable upon appeal, but for the most exceptional circumstances. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). See

generally, FEDERAL PRACTICE and PROCEDURE § 1303 (Barron & Holtzoff 1958). It is not grounds for a new trial that there existed evidence which trial counsel failed to present, *Aerated Products Co. of Los Angeles* v. *Aeration Processes*, 95 F.Supp. 23 (D.C. Cal. 1950), or that there was an error of judgment or mistake of counsel as to the effect of evidence. 3 FEDERAL PRACTICE and PROCEDURE § 1303, n. 22 (Barron & Holtzoff 1958).

The plaintiff's request for a new trial was based upon his counsel's failure to elicit certain testimony from the plaintiff on direct examination or to introduce other evidence which was available. Mr. Kucia seeks to evaluate the trial with hindsight and to relitigate the issues in a *de novo* hearing before this Court based upon that evaluation. Mr. Kucia had more than ample opportunity to prepare his case. To allow a new trial now would place a premium on poor preparation and encourage repeated litigation of the same issues. In addition, the whole thrust of the plaintiff's motion for a new trial was based upon the premise that counsel for the defendant engaged in questionable tactics which confused both plaintiff's counsel and the court. Quite properly the trial court rejected that argument as a basis for a new trial. Accordingly, denial of the plaintiff's motion for a new trial was a proper exercise of the trial court's discretion and should not be disturbed.

### A. *Matters Which have Not Been Raised Before The Trial Court Will Not Be Considered Upon Appeal.*

Many of the documents filed with this Court by the plaintiff were never offered for the trial court's consideration. Likewise, much of the material in Mr. Kucia's brief was never presented to the trial court and it cannot be considered by this Court in assessing the actions of the trial judge. That assessment may only be made based upon the record and not extrinsic matters pre-

sented for the first time on appeal. *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956). Accord, *Esteva* v. *House of Seagram*, 314 F.2d 827 (7th Cir. 1963), *cert. denied*, 375 U.S. 826 (1963). This action was pending in the District Court for almost three years. The acts upon which the claims were based occurred five years prior to the trial. The plaintiff had more than ample opportunity to prepare this case and to present all of his evidence when the case was tried.

## CONCLUSION

The record in this case demonstrates that the plaintiff has failed to offer any evidence to support his claims of breach of contract, invasion of privacy and misrepresentation. Accordingly, this Court should affirm the trial Court's judgment in favor of defendant Monsanto. This Court should also affirm the trial court's denial of the plaintiff's motion for a new trial, the plaintiff having failed to offer any substantial reasons for setting aside the judgment.

Respectfully submitted,

JAMES A. HOURIHAN
815 Connecticut Avenue
Washington, D. C. 20006

*Of Counsel:*

HOGAN & HARTSON
Washington, D. C.

IN THE UNITED STATES

COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24 487

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RICHARD R. KUCIA,

Plaintiff, Appellant

v.

MONSANTO CHEMICAL CORP. (ALIAS MONSANTO.)

Defendant, Appellee

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APPEAL

REPLY BRIEF FOR APPELLANT

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FROM DISTRICT OF COLUMBIA FEDERAL DISTRICT COURT

Case No. 748-67



Filed October, 1970 by
Richard R. Kucia, pro se
107 Kennedy Street
Alexandria, Va., 22305

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2. Who has the Burden of Proof?
3. Can the Corporations rely on evidence not of record while the Employee cannot rely on evidence of record?
4. What is the judicial standard to which the lower court's discretion is applicable?

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## SUPPLEMENTAL STATEMENT OF THE CASE

Under the financial strain, harrassment and legal restraints of the Corporation, the employee had to vigorously pursue a claim for $35/week compensation (minus legal fees) for a number of years prior to this suit (Workmen's Compensation settled in 1969). The employee was literally driven from his home after losing occupational capability; after retraining, this cause of action was prosecuted under adverse conditions in a locality remote from the original events. Very little of the 5 years prior to trial was available in which to prosecute this action.

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## ERRORS IN COUNTERSTATEMENT OF FACTS

Somehow the corporation failed to mention what was happening in December 1964 and early January 1965. (He returned from work ill and was absent from work, hospitalized.)

At the middle of page 12 of the Answer the corporation asserts Mrs. Kucia was married in 1956 - a clear factual error.

The employee sent resumes to about THREE DOZEN employers including resumes to three or more employment agencies; hence the corporations statement that he sent resumes to a dozen is in error. Actually the employee ran out of resumes in the initial batch and had a revised resume printed up (two printings).

The natural inference from the employees inability to obtain employment during "good times" is disastrous to the corporation s defense and they are misrepresenting the circumstances.

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ARGUMENT

ISSUE I

The Workmen's Compensation Act is not the exclusive remedy of an employee as is clearly evident by the action of the parties. Further no state can take away the liberty to contract of its citizens - such action is forbidden by the Constitution of the United States,

*Allegeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed 832 (1897).

> . . . The trial court, in a pretrial proceeding, granted defendant Monsanto's motion to strike the claims for illness and personal injury arising out of his employment on the ground that the Workmen's Compensation law was the exclusive remedy for those claims.
>
> From page 2 of Corporation's Brief

The corporation paid the employee incomplete medical benefits (about $290 short), vacation benefits, pay, pension benefits and contract termination pay after the illness. The benefits were contractural and were not affected by the statute. Especially note Sections 1(a) and 1(b) of exhibit 5 wherein benefits above those of Workmen's Compensation were represented by the corporation.

The Statute applies to rights in a limited section of tort law; citizens are free to negotiate and enter into written contracts with benefits above those permitted under Workmen's Compensation which is exactly what the employee is requesting herein.

To hold otherwise would give corporations who enter into insurance-type contracts an unfair advantage over insurance companies who have to pay benefits as occured in the Texas District Court.

It is not seen how the court could rely on the Texas statute to grant a pre-trial order and then refuse to consider the same statute during the trial (Tr. p. 61 and 62).

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## ISSUE II

The corporation had the Burden of Proof in its motion for Judgement. The record has both direct and circumstantial evidence supporting the employee's allegations of the injury, illness and damages.

No evidence to the contrary is in the record. The reasons for termination of the contract beg the real question. Did the employee's illness prevent him from working? The schizophrenic corporation asserts (1) he returned to work for six weeks and was able to work satisfactorily yet to the contrary asserts (2) his bad work was the reason for termination - an inconsistant stand. If he worked satisfactorily during early 1965, then why does the corporation assert bad work was the reason for termination?

From late 1964 through 1 965 the employee was not employed because of injury and illness or blackballing. The record does not support any other conclusion.

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ISSUE III

The corporation argues without any exhibits that they have sustained their burden of proof yet the employee who testified under oath in depositions, interrogatories and at the trial supported by corroborating exhibits of record and testimony, and who offered to produce more evidence has no evidence.

This absurd conclusion is beyond belief and is wrong even using the corporation's argued standard.

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ISSUE IV

The Judicial standard is a fair trial by a fair judge under

Article XIV section 1 of the United States Constitution.

Only when such a standard occurs, do the discretionary powers come into force. It is a clear abuse of discretion to completely ignore expert testimony corroborated by evidence and circumstances.

The Brief has pointed out some of the more substantial errors which occured; it is not understood that censorship, confusion, amid a host of errors measures up to the constitutional standard.

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## CONCLUSION

Numerous errors in the court below engendered by the defense necessitates a reversal.

Clearly the evidence of record establishes a prima facia case for the employee and said evidence will be of record in any subsequent proceedings; the corporation failed to make a showing of sound medical evidence negating the employees internal injury; therefore the decision below should be reversed and a judgement for the employee as requested should be granted.

Respectfully submitted

RICHARD R. KUCIA